



BRIEFING FOR INVESTORS

SHELL'S GROWING LIABILITIES IN THE NIGER DELTA

Lessons from the Bodo court case

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Hundreds of oil spills occur in the Niger Delta every year, causing devastation to the environment and undermining people's economic and social rights. Decades of pollution linked to the oil industry have destroyed people's livelihoods, abused their rights to clean water and food, and put their health at serious risk. Amnesty International has drawn attention to the lack of action on the part of oil companies to prevent the spills from happening, clean up pollution, or compensate those affected. The main focus has been on Shell as the largest company operating on land in Nigeria.

Introduction

In 2011, the United Nations Environment Programme (UNEP) confirmed the massive scale of pollution in a landmark report based on a scientific assessment of one region, Ogoniland. Their report highlighted how pollution has created a public health emergency in the Niger Delta, particularly as a result of high levels of contamination of people's sources of water. UNEP made detailed recommendations to the Nigerian government and to Shell, but until now little has been done to address the issues raised.

In January 2015, the Bodo Community in the Niger Delta achieved an historic victory when Shell announced a £55 million settlement agreement in respect of two operational oil spills from pipelines in 2008.¹ Although Shell had accepted responsibility for the spills in 2011, its initial offering to the Bodo Community was reported to have been £4,000, subsequently raised in 2013 to £18 million.² In papers filed in the UK court prior to settlement Shell admitted that its previous and often repeated assertions regarding the volume of oil spilt and area affected were substantially incorrect.

One of the outcomes of this litigation was to make more transparent some significant risks of increased ongoing litigation liability. This briefing outlines relevant findings of the preliminary judgement from this court case and key contents of the documents filed in the UK court prior to the settlement. It suggests areas of increased litigation risk and poses questions for investors to raise with Shell to assess the potential liability for spills in the Niger Delta, and what steps Shell is taking to re-examine its policies and practices relating to the protection of infrastructure and the investigation of oil spills – about which the Bodo litigation raised new substantial concerns.

Expanding grounds for liability as Shell admits disseminating misleading information

In papers filed in the UK court prior to the settlement, Shell admitted that its earlier repeated assertions regarding the volume of and area affected by the spills were incorrect. The company had previously and publicly³ defended its figures despite Amnesty International presenting Shell with substantial evidence that these figures were incorrect. These admissions also support concerns regarding the robustness and validity of the methodology underlying Shell's entire Joint Inspection Visit (JIV) process used to determine *'the spread, the volume and the cause'*⁴ of hundreds of other spills in Nigeria.

Lawyers representing the Bodo Community have warned that this settlement may 'open the door'⁵ to further lawsuits, raising the possibility of future substantial compensation pay-outs by Shell.

Shell has an obligation to protect pipelines from oil theft (bunkering)

Prior to a full trial relating to the Bodo spills, a preliminary issues hearing took place from 29 April to 9 May 2014 to consider a number of legal arguments. One of the issues to be determined was whether Shell has a duty to take reasonable steps to protect its infrastructure to prevent spills from its pipelines – whether from operational malfunction or from oil theft (bunkering).

Shell had consistently maintained that it was only liable to pay compensation where spills are caused by operational failure of its pipelines and that it had no such liability in the case of spills caused by bunkering.

However, in a judgment described by lawyers for the Bodo Community as ‘ground-breaking’, Mr Justice Aikenhead ruled on 20 June 2014 that Shell could be legally liable to pay compensation for spills resulting from illegal bunkering of its pipelines, if it failed to take reasonable steps to protect, maintain or repair its infrastructure⁶.

As a result of this judgment, Shell now faces potential liability for compensation pay-outs for a far greater number of spills than the company previously acknowledged. Shell has reported more than 1,000 Niger Delta oil spills since 2009, with 204 spills in 2014, and 203 in 2013.

At paragraph 92(g)⁷ the court held:

Short of a policing or military or paramilitary defence of the pipelines, it is my judgment that the protection requirement within Section 11(5)(b) involves a general shielding and caring obligation. An example falling within this would be the receipt by the licensee of information that malicious third parties are planning to break into the pipeline at an approximately definable time and place; protection could well usually involve informing the police of this and possibly facilitating access for the police if requested. Other examples may also fall within the maintenance requirement such as renewing protective coatings on the pipeline or, with the advent of new and reliable technology, the provision of updated anti-tamper equipment which might give early and actionable warning of tampering with the pipeline.

Shell has been criticised in the past for its apparent failure to apply international best practice to the maintenance of its infrastructure in Nigeria. Shell has defended its decision not to use equipment – considered as standard in other parts of the world – such as leak detection systems on the basis of replacement costs in the case of theft.⁸ Given the potential financial implications of the UK court decision, Shell may wish to revisit the cost benefit analysis of its decision to apply lesser standards in Nigeria than elsewhere.

Reasonable steps that Shell can be expected to take to protect its infrastructure from illegal activity, reinforced by this court ruling, include:

- Use of appropriate up-to-date technology including leak detection systems
- Effective surveillance
- Provision of anti-tamper equipment
- Provision of information to police and in some cases facilitating access.

Shell was warned about ‘risk and hazard’ to infrastructure

As a result of the settlement, the Bodo litigation did not proceed to a full hearing. However, documents submitted as part of the plaintiffs’ claims raise concerns that Shell was aware of a failure to maintain the integrity of the relevant pipelines several years in advance of the spills.⁹

These court documents refer to emails, letters and internal reports which reveal that senior Shell employees were concerned before the spills that Shell’s pipelines in the area had reached the end of their lives and needed replacing to avoid danger to lives, the environment and the economy. The documents refer to an internal presentation – carried out in 2001 by Shell and Shell Global Solutions International – which stated ‘the remaining life of most of the [Shell] Oil Trunklines is more or less non-existent or short, while some sections contain major risk and hazard’.¹⁰

An internal Shell email from December 2009, after the Bodo spills occurred, stated ‘[the company] is corporately exposed as the pipelines in Ogoniland have not been maintained properly or integrity assessed for over 15 years’.

Shell made no formal response to these specific claims prior to the settlement agreement, beyond a statement issued to the BBC in response to its report covering these issues.¹¹

However, inadequate control, maintenance and decommissioning of oilfield infrastructure was one of the key issues raised by the UNEP 2011 report on oil pollution in Ogoniland.¹² UNEP recommended that Shell develop a comprehensive programme in this regard. In response, Shell confirmed that it has set up a team to review and develop a comprehensive decommissioning programme and asset integrity plans and ‘looks forward to discussing these plans with the relevant Ogoni communities.’

Both human rights concerns and the potential financial implications of spills resulting from a failure to properly protect, maintain or repair infrastructure mean it is vital that investors ensure Shell is taking appropriate measures.

Shell’s methodology underlying inspection and assessment of oil spills is questionable

Shell has always accepted that the two Bodo oil spills were the fault of failures on the company’s pipeline at Bodo, but publicly – and repeatedly¹³ – claimed that the volume of oil spilt was approximately 4,000 barrels for both spills combined, even though the spills went on for weeks.

In 2012 Amnesty International, using an independent assessment of video footage of the first oil spill, calculated that the total amount of oil spilt exceeded 100,000 barrels for this spill alone.¹⁴ Moreover, the expert evidence obtained from the Bodo Community estimated the volume of oil spilt at 500,000 barrels, which suggests that Shell’s methodology is entirely flawed and unreliable.

In documents submitted to the court, Shell finally admitted that its figures were wrong and it had underestimated the amount of oil spilt in both of the Bodo cases. However, Shell has still not confirmed how much oil was actually spilt. Instead Shell’s legal documents stated that ‘the issues of the volume of oil released and the extent of the impact as a result of the 2008 Oil Spills will be the subject of expert evidence which will include hydrological data, satellite imagery and further data samples taken from the relevant areas.’¹⁵

Shell also admitted in these documents that the extent of the impact of the two spills also ‘exceeded the contemporaneous estimates’ reached by its JIV. However, again it declined to admit the actual extent of the impact of the spills saying that this would be the subject of similar expert evidence at the hearing.

As a pre-hearing settlement was reached, this evidence was never presented.

Concerns have long been raised that Shell’s JIV oil spill investigation process is fundamentally flawed. In a 2013 report,¹⁶ Amnesty International exposed several serious deficiencies and abuses within the JIV process used by oil companies in Nigeria that render it wholly unreliable as a basis for making claims about the cause of oil spills, the volume of oil spilt or the area affected. The report, while acknowledging improvements to Shell’s JIV process since 2011, identified serious flaws that remain in Shell’s oil spill investigation process. These include weaknesses in the underlying evidence used to attribute spills to sabotage and the fact that the JIV reports are filled out by Shell after the joint investigation process – not *as part* of the joint investigation process.

These findings have been reinforced by a 2015 research study conducted by Amnesty International and Nigeria’s Centre for Environment, Human Rights and Development.¹⁷ Four sites were examined which continue to display signs of severe ongoing pollution caused by historic oil spills, despite Shell’s claims to have cleaned them up.

Accordingly, the implications of the admissions made in the Bodo case go far beyond those two specific spills. The figures now acknowledged to be incorrect were those set out in Shell's JIVs. That Shell has to admit that the figures on two JIVs – and for two different parameters (the volume and the area affected) – are wrong is highly significant. If these data are wrong – and the methodology used is unreliable – it raises serious doubts about the data recorded in the hundreds of other JIVs conducted over the years. This may well lead to calls to reopen spill investigation outcomes in other communities and possibly to legal claims. It should also raise concerns for investors as to the reliability of information provided to them as to the cause, size and impact – and therefore potential financial consequences – of a spill.

Successful claims lead to further substantial costs

In addition to the costs of the litigation settlement, Shell reached an agreement with the Bodo Community in May 2015, to finally begin clean-up of the two spills.¹⁸ Dutch media has reported estimated clean-up costs of between \$150 million and \$500 million and a clean-up period of 10 years.¹⁹

Conclusion

The Bodo settlement was a long-awaited victory for the thousands of people who lost their livelihoods through the corporate failings of Shell. But for investors in Shell, it potentially represents only the first of many such cases. Accordingly, investors should be aware of those aspects of the Bodo case which raise the spectre of systemic failures by the company. Shell's failure to ensure proper maintenance and protection of pipelines may leave it liable to compensate victims of a spill even if caused by oil theft. Meanwhile, failures in Shell's oil spill inspection process – and therefore in its reporting on the cause, size and impact of hundreds of spills – could mask the scale of potential financial liability arising for Shell.

Ongoing risks for Shell's potential litigation liability arise from:

- Significantly increased prospects of further lawsuits being filed regarding Nigerian oil spills
- The potential for Shell to be held liable for spills from its pipelines caused by illegal bunkering if it is found to have failed to take reasonable measures to protect, maintain or repair its infrastructure
- Suggestions in court documents that Shell was warned about 'risk and hazard' to infrastructure and knew that it was operating oil pipelines and infrastructure which was not fit for purpose but failed to take appropriate action
- Concerns highlighted in court documents about the methodology underlying Shell's inspection and assessment of hundreds of oil spills in terms of cause, volumes and extent of area affected.

Questions that investors may wish to pose to Shell include:

Infrastructure related concerns:

- What is Shell's response to the claims made in court documents and set out above that Shell was aware of and failed to address the risks to the structural integrity of pipelines? Can Shell assure investors that its oil pipelines and related infrastructure in Nigeria comply with Nigerian legal standards and international best practice?
- What steps is Shell taking to maintain, repair and protect its pipelines against oil theft? What changes in relevant company practices have been made since 2009? Have all pipelines now been inspected and, if necessary, upgraded to match best current industry standards?

- Does Shell comply in full with all international standards incorporated into Nigerian Law including the following:
 - The American Society of Mechanical Engineers B31.4 (Pipeline Transportation Systems for Liquid Hydrocarbons and other Liquids)
 - The American Petroleum Institute (API) Code of Practice 1160
 - API Security Guidelines for Liquid Petroleum Pipelines 2003?
- In light of the UK judgment on preliminary legal issues, does Shell intend to reassess its cost based decision not to use certain leak detection systems on its pipelines?
- What progress has been made with regard to the decommissioning programme announced in response to the UNEP report from August 2011?
- Given that Shell is legally liable for the clean up and remediation of communities polluted by oil from its pipelines and infrastructure, why is it waiting for the Nigerian government to act before it commences the clean-up of its own oil?

Spill assessment methodology:

- When and how did Shell become aware that the JIV data for the two Bodo spills were inaccurate? What resultant changes have been implemented in its ongoing JIV process?
- Why did Shell repeatedly defend the Bodo related data even after receiving evidence of its inaccuracy from Amnesty International? How can investors be confident regarding the ongoing accuracy of spill volume and impact data?
- Would Shell have acknowledged the inaccuracy of the data had court proceedings not been taken in the UK?
- What is Shell's revised estimate of the amount of oil spilt in Bodo, and the extent of the impact of the two Bodo spills?
- Has Shell undertaken a full-scale review of its JIV processes in light of these admitted inaccuracies?

Future costs and potential liabilities:

- Has Shell reviewed any other existing JIV reports to assess other potential errors? If not, does it plan to do so? If not, does Shell accept that this has implications for investor confidence in the company's reporting of spill data, and for potential currently unanticipated financial liability in the event of future litigation?
- What is Shell's estimate of the future clean-up costs in Bodo?
- Does Shell expect to face additional legal cases outside Nigeria regarding oil spills in the Niger Delta in the next three years?
- Has the UK court's finding regarding the duty to protect infrastructure from illegal bunkering led to Shell increasing its estimates of liability for compensation payments in Nigeria?

Endnotes

- 1 <http://business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria>
- 2 <http://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills>
- 3 <http://s01.static-shell.com/content/dam/shell/static/nga/downloads/pdfs/our-response/mutius-letter.pdf>
- 4 <http://www.shell.com.ng/environment-society/environment-tpkg/oil-spills.html>
- 5 Op. Cit. no. 2
- 6 <http://www.leighday.co.uk/News/2014/June-2014/London-High-Court-rules-that-Shell-Nigeria-could-b>
- 7 <http://www.hendersonchambers.co.uk/wp-content/uploads/2014/06/Bodo-jment-prelim-issues.pdf>
- 8 <http://www.bbc.co.uk/news/business-29997074>
- 9 These documents were released as part of a court case in London in September 2015. See Dekore Donu and others and Shell, available at <https://www.dropbox.com/sh/19h0sjeedgni3hs/AACljpxmG1o8Nk1YzGgaY5k0a/Denkore%20Donu%20%26%20others%20and%20Shell.pdf?dl=0>
- 10 Ibid.
- 11 Op. Cit. no.8
- 12 UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9. Available at: <http://www.unep.org/newscentre/default.aspx?DocumentID=2649&ArticleID=8827>
- 13 Op. Cit. no.3
- 14 <https://www.amnesty.org/en/latest/news/2014/11/court-documents-expose-shell-s-false-claims-nigeria-oil-spills/>
- 15 Paragraph 7.4 and paragraph 34.4 of the document entitled: Celina Naadueba & Others and Shell, available at <https://www.amnesty.org/en/latest/news/2014/11/court-documents-expose-shell-s-false-claims-nigeria-oil-spills/>
Paragraph 6.4 and paragraph 33.3 of the document entitled: Kembe Sangbara & Others Residing in Lewe and Shell, available at <https://www.dropbox.com/sh/19h0sjeedgni3hs/AADpi09vV7bCZhpc-deqpTTBa/Kembe%20Sangbara%20%26%20Others%20Residing%20in%20Lewe%20and%20Shell.pdf?dl=0>
- 16 Bad information: Oil spill investigations in the Niger Delta <https://www.amnesty.org/en/documents/afr44/028/2013/en/>
- 17 <https://www.amnesty.org/en/latest/news/2015/11/shell-false-claims-about-oil-pollution-exposed/>
- 18 <http://qz.com/399765/nigerias-delta-oil-spill-clean-up-will-cost-shell-billions-of-dollars-over-30-years/>
- 19 <http://www.volkskrant.nl/economie/shell-betaalt-fors-voor-opruimen-vervuilde-nigerdelta~a3995290/>

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